

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CYRIL DAVID DANIEL ORAM, JR.,

Plaintiff,

v.

ROBERT WILKIE, et al.,

Defendants.

Case No. C21-75RSM

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT

This matter comes before the Court on the parties' Motions for Summary Judgment. Dkts. #19 and #20. Defendant the United States Department of Veterans Affairs (the "VA") moves for summary judgment in this Freedom of Information Act ("FOIA") and Privacy Act litigation, arguing that it has "released to Plaintiff all responsive, non-exempt records located as a result of a reasonable search for the two records requests alleged in the Amended Complaint." Dkt. #20 at 2. The VA states that it has withheld no documents and made redactions under FOIA Exemption 6 only for social security numbers and "rating specialist numbers belonging to third parties." *Id.* The VA argues that Plaintiff's other claims are either moot, premature, or procedurally improper. *See id.*

The only record requests properly before the Court are those set forth in Plaintiff's Amended Complaint. *See* Dkt. #17 at ¶ 20 ("FOIA & Privacy Act request to the VA dated Apr

23, 2020”) and at ¶ 30 (“FOIA & Privacy Act request to the VA dated Mar 3, 2021”); Dkt. #17-1 at 1 and 32–33. The first request, dated April 24, 2020, states “I request a copy of my claims folder (C-File).” Dkt. #17-1 at 1. A “C-file” is a collection of records kept by the VA in connection with a veteran’s disability claims. Dkt. #21 (“Harvey Decl.”), ¶ 4. It “typically includes service treatment records, discharge documents, claim-related documents and service-related documents.” *Id.* In response to this request, the VA conducted a search of the Veterans Benefit Management System (“VBMS”) database, using Plaintiff’s name and social security number to identify responsive records. *Id.* at ¶¶ 4–6. The VA used their typical FOIA/Privacy Act process to determine what to release. The VA did not withhold any documents but included redactions of social security numbers and rating specialist numbers belonging to other veterans and VA claims processors. The VA redacted this information because third-party information is not subject to release under the Privacy Act and because it is protected by FOIA Exemption 6. *Id.* at ¶¶ 7–8.

The VA released these records to Plaintiff by mailing a CD to the address Plaintiff provided on November 3, 2020. *Id.* ¶ 9, Ex. 3. On December 8, 2020, Plaintiff submitted an appeal to the Office of General Counsel indicating that he had not received his C-file. *Id.* at ¶ 10. In January 2021, the VA mailed the records to a new address provided by Plaintiff. *Id.* at ¶ 11. The package was subsequently returned to the VA as undeliverable. *Id.* On or about January 20, 2021, Plaintiff initiated this litigation. *See* Dkt. 1. On February 23, 2021, the VA mailed the records to the address provided by Plaintiff, and Plaintiff acknowledges receiving them. *See id.* at ¶ 12; Dkt. #17 ¶ 17 n.6.

The second request alleged in the Amended Complaint, dated March 3, 2021, states, “I hereby request a copy of my compensation and pension exams.... performed... on March 3,

1 2021 and related to the Veteran's Title 38 Claim(s) and wherever such records about the
2 Veteran's claim are kept or stored by the VA." Dkt. #17-1 at 32. On March 24, 2021, Plaintiff
3 sought leave to amend his Complaint to include allegations related to this new request. *See*
4 Dkts. #15 and #16. The Amended Complaint also includes a cause of action for unlawful
5 patterns of practice under FOIA and the Privacy Act. Dkt. #17 at 8–9.
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7 In response to Plaintiff's March 3, 2021, records request, the VA conducted a search of
8 the VBMS database using Plaintiff's name and social security number as search terms, and then
9 a supplement manual search for "C&P Examination Results" and "March 3, 2021." Harvey
10 Decl. at ¶ 14. All records found by the VA were released without redactions to Plaintiff under
11 the Privacy Act. *Id.* They were sent by mail on a CD on April 1, 2021. *Id.* at ¶ 19. Before the
12 VA released these records, on March 30, 2021, Plaintiff sent an email to the VA FOIA appeals
13 office indicating "I requested an expedited faxed copy of my C&P exam and I have not
14 received a timely response in the matter or a timely request for an extension of the initial
15 request as statutorily mandated under FOIA." *Id.* at ¶ 15, Ex. 4. The VA interpreted this to be
16 an appeal, and in response to Plaintiff's demands that the records be either faxed or sent by
17 email, the VA advised that the records would be sent by mail as they contained personally
18 identifiable information. *Id.* at ¶¶ 15-16, Ex. 4. Plaintiff acknowledges receiving these records.
19 *See* Dkt. #19.
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22 Plaintiff's Motion for Summary Judgment identifies other records requests that do not
23 appear in the Amended Complaint. Plaintiff concedes that claims for requests dated May 21
24 and May 25, 2021, are "premature" as no deadline had passed at the time of his May 27, 2021
25 Motion. *See* Dkt. #19 at 2–3.
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1 In FOIA cases, the usual summary judgment standards apply and “if there are genuine
2 issues of material fact in a FOIA case, the district court should proceed to a bench trial or
3 adversary hearing” and issue findings of fact and conclusions of law. *Animal Legal Def. Fund*
4 *v. United States FDA*, 836 F.3d 987, 990 (9th Cir. 2016) (citing Fed. R. Civ. P. 52(a)(1)); *see*
5 *also Cameranesi v. United States DOD*, 856 F.3d 626, 636 (9th Cir. 2017) (“We have now
6 overruled this FOIA-specific summary judgment standard, and instead apply our usual summary
7 judgment standard.”).

9 Accordingly, summary judgment is appropriate where “the movant shows that there is
10 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
11 law.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).
12 Material facts are those which might affect the outcome of the suit under governing law.
13 *Anderson*, 477 U.S. at 248. In ruling on summary judgment, a court does not weigh evidence to
14 determine the truth of the matter, but “only determine[s] whether there is a genuine issue for
15 trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins.*
16 *Corp. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

19 On a motion for summary judgment, the court views the evidence and draws inferences
20 in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S.*
21 *Dep’t of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable
22 inferences in favor of the non-moving party. *See O’Melveny & Meyers*, 969 F.2d at 747, *rev’d*
23 *on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a “sufficient
24 showing on an essential element of her case with respect to which she has the burden of proof”
25 to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
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FOIA establishes “a judicially enforceable right to secure [government] information from possibly unwilling official hands.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976) (citing S. Rep. No. 813, 89th Cong. (1st Sess. 1965)); *see also Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009). The aim of these disclosure requirements is to “ensure an informed citizenry, vital to the functioning of democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978); *see also Hamdan v. United States DOJ*, 797 F.3d 759, 770 (9th Cir. 2015); *Shannahan v. I.R.S.*, 672 F.3d 1142, 1148 (9th Cir. 2012).

Federal agencies have a duty to construe FOIA requests liberally. *Yagman v. Pompeo*, 868 F.3d 1075, 1080 (9th Cir. 2017). Upon receipt of a FOIA request, a federal agency “shall make the records promptly available,” 5 U.S.C. § 552(a)(3)(A), and “shall make reasonable efforts to search for the records” responsive to a request. *Id.* § 552(a)(3)(C)–(D). Agencies must respond to FOIA requests within twenty business days of receipt, *id.* § 552(a)(6)(A)(i), and disclose responsive documents unless one or more of FOIA’s exemptions apply. These exemptions are “narrowly construed.” *Shannahan*, 672 F.3d at 1149. An agency bears the burden of establishing that an exemption applies. *Lahr*, 569 F.3d at 973. “Any reasonably segregable portion of a record shall be provided” to the FOIA requester. 5 U.S.C. § 552(b).

“Unlike FOIA . . . the Privacy Act does not have disclosure as its primary goal.” *Carlborg v. Dep’t of the Navy*, No. 18-CV-1881 (DLF), 2020 WL 4583270, *3 (D.D.C. Aug. 10, 2020) (internal quotation omitted). “[T]he Privacy Act’s primary goal is to protect the privacy of individuals through regulation of the collection, maintenance, use, and dissemination of information by federal agencies . . . [and] as part of the effort to give individuals more

1 control over information about themselves, the Privacy Act gives individuals a right to gain
2 access to government records concerning themselves upon request.” *Rojas v. FAA*, 941 F.3d
3 392, 397 (9th Cir. 2019); *see also* 5 U.S.C. § 552a(d)(1). Critically, the Privacy Act only
4 authorizes disclosure of a record if it pertains to the requester. *See* U.S.C. § 552a(b); *Carlborg*,
5 2020 WL 4583270 at *7 (requester not entitled to third party-information under Privacy Act).
6 The Privacy Act also “only includes access to records maintained in a ‘system of records,’
7 meaning ‘group of any records under the control of any agency from which information is
8 retrieved by the name of the individual or by some identifying number, symbol, or other
9 identifying particular assigned to the individual.’” *Singh v. USPS*, No. C17-0233-JCC, 2017
10 WL 2930590, at *4 (W.D. Wash. July 10, 2017), *aff’d*, 713 F. App’x 661 (9th Cir. 2018)
11 (quoting 5 U.S.C. § 552a(a)(5)). And, unlike FOIA, “the Privacy Act does not contain any
12 deadlines for responding to a request.” *Demoruelle v. Dep’t of Veterans Affs.*, No. CV 16-00562
13 LEK-KSC, 2017 WL 2836989, at *7 (D. Haw. June 30, 2017).

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16 However, like “the public access right granted by FOIA, the Privacy Act’s private
17 access right is subject to numerous exemptions.” *Rojas*, 941 F.3d at 397. While the statutes are
18 similar in this regard, their exemptions are not co-extensive. *See Carlborg*, 2020 WL 4583270
19 at *3. For a records request where “both statutes are at play, an agency seeking to withhold
20 records must demonstrate that the documents fall within some exemption under each Act.” *Id.*
21 (internal citation omitted). Similarly, “[u]nder both the Privacy Act and FOIA, an agency must
22 conduct an adequate and reasonable search for relevant records.” *Id.*

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25 The Court has reviewed the undisputed facts and procedural history of this case as
26 submitted by the parties. The Court understands Plaintiff’s frustration with the delay in
27 receiving his records and the problems caused by the VA’s insistence on sending them on a CD
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1 as opposed to in an email. However, the record shows that the VA has now released all non-
2 exempt materials responsive to his April 24, 2020, and March 3, 2021, records requests. *See*
3 Harvey Decl. ¶¶ 9-12, 19-20. Plaintiff's claims that the search process was flawed or that
4 certain documents were withheld are speculative and unsubstantiated. The VA argues that the
5 claims in this case are therefore moot, and the Court agrees. *See* Dkt. #20 at 8 (citing, *e.g.*,
6 *Johnson v. Comm'r*, 239 F. Supp. 2d 1125, 1137 (W.D. Wash. 2002) ("If, upon the initiation of
7 a lawsuit, it is determined that all documents found responsive to the underlying request have
8 been released in full to the requester, the litigation should be dismissed on the grounds of
9 mootness because there is no justiciable controversy"); *Sterrett v. Dep't of Navy*, No. 09-CV-
10 2083-IEG POR, 2010 WL 330086 at *2 (S.D. Cal. Jan. 20, 2010) (collecting cases);
11 *Demoruelle*, 2017 WL 2836989 at *7).

14 Plaintiff has not made an adequate showing of the essential elements of his pattern or
15 practice claim. To support such a claim, he must demonstrate that an "alleged policy or
16 practice will impair plaintiff's 'lawful access to information in the future.'" *Nat'l Parks*
17 *Conservation Ass'n v. U.S. Dep't of the Navy*, No. C19-645 TSZ, 2021 WL 1192443, at *6
18 (W.D. Wash. Mar. 30, 2021). Plaintiff has failed to identify such a policy or practice, other
19 than to point to the isolated instance of the VA's delay in responding to his April 24, 2020,
20 request. Dismissal is therefore warranted. *See Celotex Corp., supra*.

22 Plaintiff cannot continue this litigation by raising new FOIA or Privacy Act requests not
23 contained in his Amended Complaint, and he appears to acknowledge that such claims are
24 premature. Monetary damages are not available under either FOIA or Privacy Act claims. *See*
25 *Johnson*, 239 F. Supp. 2d at 1138. Fees or costs are not warranted under the facts of this case.
26 Sanctions under Rule 11 are unwarranted given all of the above, and in any event Plaintiff's
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1 request is properly denied as procedurally improper because he did not include it in a separate
2 motion and failed to provide notice before making the request. *See* Fed. R. Civ. P. 11(c)(2).

3 Accordingly, the Court hereby finds and ORDERS:

- 4 1) Plaintiff's Motion for Summary Judgment, Dkt. #19, is DENIED.
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6 2) Defendant's Motion for Summary Judgment, Dkt. #20, is GRANTED. All of
7 Plaintiff's claims are DISMISSED.
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9 3) Plaintiff's Motion for Leave to File Response to Agency Reply is DENIED as the
10 requested relief is procedurally improper under Local Civil Rule 7.
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12 4) All other pending Motions are DENIED as MOOT. This case is CLOSED.

DATED this 28th day of October, 2021.

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15 RICARDO S. MARTINEZ
16 CHIEF UNITED STATES DISTRICT JUDGE
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